No. 15146

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, Jr.,
LOUIS GLEN BALLARD,
and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT CLIFFORD L. DUKE, JR.

BARTON C. SHEELA, JR.,
GEORGE WILLIAMS RUTHERFORD,
CLINTON F. JONES, and
WESLEY B. BUTTERMORE, JR.
1101 Bank of America Building,
San Diego, California

Attorneys for Appellant
Clifford L. Duke, Jr.

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INTRODUCTION

This reply brief is confined to one issue. That is the issue arising under the Sixth Amendment of the United States Constitution.

Appellant submits the remaining questions on the argument heretofore presented in the opening brief, except however Appellant believes that the point of Appellee (failed to comply with rules) on three of the questions is well taken and Appellant withdraws or concedes the following:

Question 7; Question 10 (a) and (c)

Appellant claims that his trial was had in violation of the Sixth Amendment to the United States Constitution. The issue arises out of the following ultimate facts which are based on the proceedings of August 3rd and 4th, 1955.

1. Appellant was his own counsel in charge of his case at the commencement of the trial and Appellant did not at any time intentionally or otherwise relinquish control of his case or give up the status as his own counsel, but on the contrary, endeavored continually to preserve that status; (Tr. 27-44) (36-A-1 to A-3; 36-A-160 - 36-A-171)

2. The court prevented Appellant from electing to proceed in propria persona initially on August 3rd, by imposing a condition which impaired the right, and again on August 4th by denying Appellant's timely motion to be permitted to dispense with a lawyer's aid and proceed alone; (Tr 28; 36-A-2)

3. Appellant was in good faith attempting to exercise his right to represent himself solely because he was the only person who was prepared and no good reason appears for preventing his doing so; (36-A-163; 36-A-166; 36-A-170)

4. The court's ruling in effect compelled Appellant over objection to proceed to trial with a lawyer admittedly unprepared to give him any effective representation. (36-A-160; 36-A-164; 36-A-171)

SOLE QUESTION OF LAW

Does the provision of the Sixth Amendment that the "accused shall enjoy the right ... to have the assistance of counsel for his defense" include a correlative right to dispense with a lawyer's help and proceed alone?

II

THE SIXTH AMENDMENT RESTATEMENT OF THE UNCONTESTED ISSUE

It is with regret that we are compelled to direct this Honorable Court's attention to a portion of Appellee's brief which creates a distorted version of a segment of the trial proceedings and of the important issue of constitutional law arising therefrom. That question is:

> Does the provision of the Sixth Amendment that the "accused shall enjoy the right . . . to have the assistance of counsel for his defense" include a correlative right to dispense with a lawyer's help and proceed alone?

It is Appellant's position that an affirmative answer to this question will require reversal of the judgment. In the event the question is answered in the negative then there are secondary questions concerning whether the right of an accused to appear and defend in propria persona without counsel is protected by statute and judicial decision; if the accused has no such right either constitutional or statutory, then a question of abuse of discretion would rise.

The constitutional question specifically arises from the rulings of the court made at the inception of the trial denying Appellant the right to proceed to trial in propria persona without the aid of any counsel.

Appellee makes no reference whatsoever to this constitutional question or to the ruling, but instead has selected and argued an issue based on a portion of the record quoted completely out of context.

In view of this obvious distortion Appellant feels compelled to review the position of Appellant, Appellee and the record so as to leave no question with respect to the issue raised by this Appellant in this phase of the appeal and the existence of the facts which give rise to that issue.

Appellee commences the argument on the constitutional issue with the following topic heading at page 46 of their brief:

> "Appellant Duke's Constitutional Rights Under the Fifth and Sixth Amendments Were Not Infringed by Reason of the Rulings of the Court Requiring Him to Elect Whether He Would Accept Counsel or Would Proceed in Propria Persona."

Appellee then states what he perceives to be the factual setting for this topic at page 46:

> ". . . At the commencement of the trial below appellant Duke sought to associate Clifford Fitzgerald, Esq., a member of the San Diego Bar. At this point he was informed by the Court below that he could either appear in propria persona or could be represented by counsel but that he could not do both simultaneously. It is this ruling, basically, which gives rise to this particular ground of appeal . . ."

Implicit in the statement of Appellee is the assumption that Appellant was given the right to make a free choice between two complete alternatives. That

is either to appear as his own counsel and be permitted to exercise all the functions incidental thereto, or select an attorney to conduct his defense. That is patently incorrect. The trial court did not at this time or at any other time give this Appellant an opportunity to elect freely. What Appellee neglects to point out was that the court imposed such an onorous condition on the right to appear in propria persona, that such right was effectively denied. This condition was that if Appellant testified as a witness then he could not argue to the jury, and thus, at a critical stage of the case Appellant would be without any counsel because the court had said that if Appellant defended himself he could not have the assistance of anyone.

It is Appellant's position that the conditions imposed on the right to appear in propria persona in effect was a denial of that right.

Appellee, in their brief beginning at page 47 and ending on page 53, quoted excerpts from the record during part of the proceedings which gave rise to the constitutional question with two significant omissions. The first was the proceedings on the afternoon of August 3rd, wherein Appellant explained with great detail the impossible position in which the court had placed him by the earlier ruling and insisting that the court permit him to conduct his own case at least at the outset. Likewise omitted are the proceedings which show that Mr. Fitzgerald was never made counsel for Appellant as the court later contended, but was expressly associated as co-counsel with Appellant and with the permission of the court.

The second omission which in effect distorts and

changes the entire complexion of the proceedings occurs with respect to portions of the record quoted from the proceedings had on the morning of August 4th, just prior to the commencement of the trial in the presence of the jury. Here Appellee quotes in detail portions containing the final ruling of the court to the effect that Appellant was under an obligation to appear in propria persona, or to be represented by counsel but could not do both. The record shows that the court proceeded to outline the precise areas in which Appellant would be permitted to participate to a limited extent. As appears in the brief of Appellee, Appellant at that time requested permission to at least be permitted to open the case before the jury because he alone was prepared. From Appellee's brief it would appear that the proceedings ended upon the denial of this motion for the rest of the proceedings are omitted and at this point Appellant states at page 53:

> "...While an accused is entitled to assistance of counsel in a Federal criminal case or is entitled to appear in propria persona and conduct his own defense, the choice is in the alternative and not the cumulative. The accused must make his choice..."

No further excerpts from the record pertaining to this question are set forth, nor is there any further reference to these proceedings, and Appellee finally concludes the entire argument on this constitutional question at page 65 of their brief with the following statement:

> "The orders of the Court in denying Duke

> "permission to appear in propria persona and by counsel simultaneously were correct and no prejudice resulted therefrom."

What Appellee omitted from the above proceedings and which appears as the very next statement was the inquiry by Appellant concerning Mr. Fitzgerald withdrawing from the case so Appellant could proceed in propria persona alone, and the court's refusal to permit Mr. Fitzgerald's withdrawal. The record then reveals that following brief argument on the matter Appellant made a formal motion that the court relieve Mr. Fitzgerald.

Thus, when the portion of the record is placed back in context it appears that Appellee's statement that the court required Appellant to make an election which Appellant refused has no foundation in fact for the record discloses that when the court announced its final ruling on the matter, which had been under submission since the day before, Appellant promptly elected to exercise his right to proceed as his counsel and so moved the court for leave to do so. The record shows that this motion was denied, and thereafter the trial commenced in the presence of the jury.

Although a review of the entire proceedings commencing the day before are necessary for a full understanding of the issue, it is this particular motion and its denial that forms the basis for the constitutional question. Appellant contends that the court never gave him a free opportunity to appear in propria persona and finally absolutely prevented him from doing so. Although the court imposed an untenable condition on him right at the outset, Appellant

nonetheless after due consideration of the serious limitations elected to proceed in propria persona even though it meant forfeiting his right to argue at the conclusion of the case. The court, though seeming to indicate Appellant had the right to make such an election, still denied the motion.

Now the issue stated by Appellee is simply not present. We believe it is abundantly clear from the opening brief that this Appellant's basic complaint concerned itself with the order of the court at the inception of the trial denying Appellant's request to be permitted to act as his own counsel alone and not simultaneously with anyone else.

In this Appellant's opening brief, Topic I, B, page 47, it is stated that the issue raised by Appellant involves the rulings of the trial court denying Appellant the right to proceed to trial as his own counsel and in the pages following, 48 through 53, inclusive, the proceedings prior to the commencement of trial in the presence of the jury are related. Likewise, practically the entire record during this portion has been quoted verbatim in the Appendix to Appellant's opening brief in Volume II, pages 84 to 134. Also, the authorities cited by Appellant and the argument particularly on page 53 of the opening brief, wherein Appellant explains that he wanted Mr. Fitzgerald out of the case before the trial commenced in the presence of the jury, demonstrate the nature of Appellants' complaint.

It is fundamental that on appeal Appellant selects the rulings which he desires to assign as error and presents them to this Honorable Court with

proper specifications and arguments supported by the record below. It is the duty of the Appellee to respond to the questions raised by Appellant. Appellee is not privileged to select an issue more convenient to answer and thereby ignore those raised by Appellant. That is precisely what has happened in this case. It would seem that an issue involving the proper application and interpretation of the Sixth Amendment to the Constitution at least merits as much attention as a question involving the good taste or good sense of the Appellant in suggesting that this prosecution was the result of a certain amount of wrongdoing on the part of others.

Although the proceedings of August 3rd and 4th have been discussed and quoted at length, in view of the confusion that has arisen excerpts taken from the record of those proceedings are attached to this brief as an Appendix.

Quoted below are two brief excerpts from the record. The first is the initial statement of the court on August 3rd to Appellant pertaining to Appellant conducting his own case, and the record in the final order of the Court denying appellant's motion.

AUGUST 3rd

"MR. DUKE: I am representing myself, your Honor, associating Mr. Fitzgerald."

"THE COURT: You can't do that. Is Mr. Fitzgerald of record?"

"MR. DUKE: No, your Honor."

"THE COURT: You had better get yourself a lawyer of record, of if you are going to defend yourself, bear in mind the rule. Now, I don't know how firm a rule it is, but it is a rule that those who give testimony cannot argue the case to the jury. And if you intend to testify, bear in mind that there are rules which would prevent your arguing the case to the jury, if you do that. If you want Mr. Fitzgerald to be your attorney, get him of record. If he is of record you cannot act in pro per or as an attorney with him."

AUGUST 4th

"MR. DUKE: If Mr. Fitzgerald withdrew from the case I would be permitted to proceed in propper?"

"THE COURT: I am not going to permit him to withdraw at this time."

"MR. DUKE: I don't know whether I formally moved or not. I do at this time formally move the court to allow Mr. Fitzgerald to be released."

"THE COURT: Denied."

(Tr. p. 28; 42; 44)

III.

ARGUMENT

A. COURT DENIED APPELLANT THE OPPORTUNITY TO ENJOY THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL CONTRARY TO THE SIXTH AMENDMENT OF THE CONSTITUTION AND BY REASON THEREOF THE JUDGMENT OF CONVICTION IS VOID.

1. BY REASON OF THE SIXTH AMENDMENT AS INTERPRETED BY STATUTES AND AND JUDICIAL DECISIONS AN ACCUSED HAS AN ABSOLUTE RIGHT TO ELECT TO DISPENSE WITH A LAWYER'S HELP AND CONDUCT HIS OWN CAUSE PRO SE AND THIS MEANS THAT THE ACCUSED MUST BE ACCORDED AN OPPORTUNITY TO EFFECTIVELY EXERCISE THIS RIGHT.

The United States Supreme Court and the Courts of Appeal of the various circuits have considered a variety of claims by an accused that his trial was had in violation of one or more of the express provisions of the United States Constitution. In reviewing these decisions one is immediately impressed with the thorough and probing examination that these courts have patiently and consistently given each claim, many of which are patently frivolous. If there be a single principle that any one of the decisions could be cited as establishing it is that these United States courts have a fastidious regard for justice administered in conformity with these fundamental constitutional safeguards.

Appellant claims his trial was had in violation of one of the seven fundamental safeguards contained in the Sixth Amendment, which provides inter alia:

> "in all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." (emphasis added)

According to the decisions of the United States Supreme Court, Courts of Appeal and Congressional enactments, this constitutional safeguard means:

1. That the right to assistance of counsel means the right to effective assistance of competent counsel and the accused must be afforded a reasonable opportunity to preserve this right at all stages of the proceedings.
2. This right the accused, at his election, is absolutely privileged to freely exercise either in person acting as his own counsel, or by an attorney of his choice, or if unable to obtain an attorney the court must assign counsel to assist him.
3. Upon request the accused must be given an opportunity to make a free choice whether he will select his own counsel or whether he will elect to exercise his constitutional right in person.
4. If the accused is denied an opportunity to exercise a free choice in the exercise of any of his alternative rights, or if he is prevented from effectively exercising one of the rights, the court is without jurisdiction to convict.

The leading case which has been followed by all subsequent cases construing the Sixth Amendment is Johnson v. Zerbst, 304 U. S. 458, decided in 1938. In that case the Supreme Court on habeas corpus set aside a conviction where the accused was not provided counsel and there was no intelligent waiver. The court held that compliance with the constitutional mandate was an essential requisite to the court's jurisdiction.

The freedom of choice accorded the accused in the exercise of the right to counsel under the Sixth Amendment is specifically illustrated by Wolleck v. Hudspeth, (1942, C. A. 10th), 128 F. 2d 343, and United States v. Bergamo, (C. A. 3rd, 1946), 154 F. 2d 31. In Wolleck v. Hudspeth, supra, the defendant on the day of trial advised the court he wanted to employ an attorney. The court offered to appoint counsel for him on the condition that the trial proceed at once. The defendant declined and he was tried without counsel. The conviction was set aside by the Court of Appeals, holding that the defendant had the right to select counsel of his own choosing and that the court's offer to appoint counsel on condition trial proceed at once was in effect a denial of counsel.

In United States v. Bergamo, supra, defendants, residents of New Jersey, were indicted in Pennsylvania. They retained a New Jersey lawyer to represent them and also a Pennsylvania lawyer to serve in a more limited capacity. The court refused to permit the New Jersey lawyer to participate because he was not admitted to practice in the State of Pennsylvania. The Pennsylvania lawyer had been in the case

more than three weeks prior to trial and although he conducted the trial he was assisted in the courtroom by the lawyer from New Jersey. The Court of Appeals reversed, stating at page 35:

> "Under the circumstances the defendants were deprived of the advice of counsel of their own choosing. . .
>
> "Nor was their representation effective. Since they were deprived of a constitutional right the judgment of conviction pronounced by the court was void."

The United States during its last term (October 1955 Term) rendered two decisions significant in that they point up clearly that the court distinguishes between those cases where there has been an opportunity afforded for the exercise of constitutional rights, and those cases in which no opportunity has been afforded. The two cases are Michel v. State of Louisiana, 350 U. S. 91, 76 S. Ct. 158, decided December 5, 1955; and Reece v. State of Georgia, 350 U. S. 85, 76 S. Ct. 168, decided on the same day. In both cases the defendants were convicted in state courts after having been indicted by the grand juries in those respective states. In each case, each of the defendants were indicted and convicted for the crime of rape and sentenced to death. The states, Louisiana and Georgia, respectively, each had procedural laws strictly limiting the time within which any defendant could file a motion to challenge the legality of the composition of the grand jury on account of race discrimination.

In the first case, Michel v. State of Louisiana, supra, the defendant Michel was appointed counsel three days prior to the expiration of the time for filing the motion. The Supreme Court affirmed the conviction holding that the fact that appointed counsel failed to file a timely motion did not overcome presumption of effectiveness of representation. The Chief Justice, Mr. Justice Black and Mr. Justice Douglas dissented.

In the Reece case the defendant likewise failed to file a timely motion, but in this case the defendant was not provided counsel until the day after the time had expired. Here the court reversed stating:

> "The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the union may disregard. . .
>
> ". . . In the present case the right to object to a grand jury presupposes an opportunity to exercise that right."

In the one case, i. e., Reece, there was no opportunity to exercise the right because of belated appointment of counsel. In the other, i. e., Michel, counsel was appointed but through lack of diligence failed to exercise the right.

2. THE PROVISION OF THE SIXTH AMENDMENT THAT THE ACCUSED SHALL ENJOY THE RIGHT TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE INCLUDES THE CORRELATIVE RIGHT TO DISPENSE WITH A LAWYER'S HELP AND PROCEED ALONE, AND THE ACCUSED HAS FREEDOM OF CHOICE IN SELECTING THE MOST EFFECTIVE MEANS FOR PRESENTING HIS CASE IN COURT.

The absolute right of an accused to elect to appear as his own counsel is established by statute as well as judicial decision. 28 U. S. C. A., Sec. 1654 provides:

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. As amended May 24, 1949, C. 139, Sec. 91, 63 Stats. 103." (emphasis added)

Rule 44 of the Federal Rules of Criminal Procedure provides:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him in every stage of the proceeding unless he elects to proceed without counsel, or is able to obtain counsel." (emphasis added.)

This rule became effective March 21, 1946, and stems from the language of the Supreme Court of the United States defining the right to counsel under the Sixth Amendment in Johnson v. Zerbst, supra, and subsequent decisions.

The leading case on the right of an accused to personally exercise the functions of counsel was Adams vs. U. S., 317 U. S. 269. In this case the defendant elected to conduct his own defense, and was afforded full opportunity to do so. He waived a jury and was convicted. The Court of Appeals reversed holding an accused without independent counsel could not waive a jury. The Supreme Court reversed the decision of the Court of Appeals and affirmed the conviction holding that the right to dispense with a lawyer's help and proceed as one's own counsel was not a mere legal formalism, but was correlative to the right to assistance of counsel under the Sixth Amendment, and that an accused who is competent and knows what he is doing is entitled to exercise a free choice in the matter.

The decisions of the several Courts of Appeal have without exception recognized the rights of an accused, under the Constitution, to conduct his own case pro se, among which are United States v. Cantor, 217 F. 2d. 536, (C. A. 2d. 1954), United States v. Shelton, (C. A. 5th, 1953), 205 F. 2d 806, and United States v. Mitchell, 137 F. 2d 1006, and 138 F. 2d 836.

In United States v. Cantor, supra, the defendant at his election was accorded full opportunity to conduct his own defense. Nonetheless, the trial judge in an

apparent effort to make certain that the defendant enjoyed the full exercise of his right assigned counsel to give whatever assistance the defendant would permit. The defendant conducted his own defense without restriction, including addressing the jury in opening, and the assigned attorney gave whatever assistance that the defendant requested. On appeal the defendant complained of a remark made by the attorney in the presence of the jury that he had been assigned without fee. The Court of Appeals affirmed concluding that the defendant was not deprived of his right to try his case. The court stated at page 538:

> ". . . the right of an accused to conduct his own defense without counsel is clear. (citing cases) In this instance a middle course was taken in that defendant was not deprived of his right to act as his own trial lawyer, but was never the less, not permitted to try his case without some participation by assigned counsel. Assuming that he declined such assistance with his eyes open there was some curtailment of his right to proceed alone and if any prejudice to the appellant was the result of that the judgment should be reversed."

In the case of Shelton v. United States, supra, (cited by Appellee at page 53) the defendant elected to, and did, fully represent himself, but requested that the court appoint counsel to advise him during the trial. The court refused, stating that defendant was either going to be represented by counsel or was going to represent himself and that the court would not appoint a lawyer and have him occupy an inferior position in the conduct of the case. On appeal the

defendant contended that 28 U. S. C. 1654, which stated the rights in the alternative, was unconstitutional and that he had the right to have counsel assigned to advise him while he conducted his own case. The Court of Appeals affirmed.

RATIO DECIDENDI: Under the Sixth Amendment the accused shall enjoy the right to have the assistance of counsel and shall enjoy the relative right to dispense with a lawyer's aid and proceed alone.

In order to conclude that Shelton was deprived of any constitutional right by refusal of the court to assign counsel on demand necessarily means that Shelton in defending himself was exercising the alternative guaranteed him under the Sixth Amendment.

In Craig v. United States, 217 F. 2d. 355, two defendants were jointly charged and employed the same attorney who appeared and represented them throughout the trial without any indication of dissent from either defendant. After conviction defendant Craig contended that a conflict of interest prevented effective cross-examination of a witness. The court reversed the judgment on the ground that the conflict in fact appeared and therefore Craig had been deprived of effective assistance of counsel. The court stated at page 355:

> "The prejudice to a defendant from the failure to have the effective assistance of counsel results whether counsel is court appointed or selected by the accused . . ."

> "Craig was in no way deprived of his right to independent counsel of his own choosing by

> "any act of the District Judge or District Attorney; nevertheless, by reason of a combination of circumstances, not reasonably foreseeable by court or counsel he did not receive the effective assistance of counsel to which he was entitled under the Sixth Amendment. . ."

That the right to counsel means effective assistance of competent counsel was established in the case of Glasser v. United States, (1942) 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457. The Court, holding that assistance of counsel meant effective assistance and the error of the trial court in requiring defendant's counsel, over his objection to represent a co-defendant, required that judgment be set aside. The court went on to hold specifically that irrespective of any possible conflict of interest the defendant had the right to insist that the court abstain from imposing any additional burdens on his counsel that might impair effectiveness, and that the right to counsel was "too fundamental and absolute to permit any nice calculations concerning the amount of prejudice arising from its denial."

In United States vs. Mitchell, supra, the court held:

> "Presumably if an accused during the trial decides that he wishes to proceed alone and without delaying the trial, and makes his decision with full knowledge of the risks he is taking . . . that course should be open to him, in view of the fact that he must have complete confidence in his counsel. ."(Emphasis added)

In United States v. Dennis (C. A. 2d. 1950), 183 F. 2d. 201 (appeal from the decision of the District Court case of United States v. Foster, 9 F. R. D.367) the defendant, at the end of a nine month trial made what the court deemed a colorable attempt to discharge his attorney. After extensive findings concluding that the defendant and his attorney were in bad faith the request was denied. The Court of Appeals affirmed stating:

> "True, one has an absolute privilege of doing without any attorney, if one wishes, but that is quite different from the privilege of discharging him without any substantial reason at the very conclusion of the case." (Emphasis added)

In Mitchell and Dennis the defendants were not attempting to exercise any constitutional right. One (Mitchell) was merely creating a disturbance and the other was seeking an opportunity to do so. However, the decisions both recognize the right of an accused to proceed alone. That the court would protect to the fullest any good faith attempt to actually exercise the right is demonstrated by the decision of that same court in the Cantor case, (supra).

Although Craig and Glasser establish the principle that the right to counsel means effective counsel another principle inherent in the decisions is significant.

In Craig, the court broadened the established principle that exercise of a constitutional right presupposes an opportunity for its exercise. Craig was

permitted to raise a claim of ineffective counsel after the trial when it was made to appear that he didn't acquire knowledge of the fact which gave rise to the complaint until that time. Therefore, it would follow that if Craig at any time during the trial had discovered the fact he would be entitled to absolutely discharge his counsel. Failure to grant such a request would necessarily compel reversal.

Thus, the right that is being protected is effective assistance of counsel and when the fact of ineffectiveness is made to appear a reversal will follow. Thus, considering Mitchell, Dennis and Craig it would appear any time the accused presents in good faith a substantial reason for either proceeding alone, or for discharging or changing counsel, and it appears that failure to grant the request is likely to impair or destroy the effectiveness of counsel, then the request must be granted.

This principle is solidified by Glasser vs. United States, supra. There the Supreme Court having concluded that the Sixth Amendment contemplated effective assistance of counsel held it was Glasser's right to determine in what manner he could obtain the most effective representation. Thus, Glasser, having decided that divided assistance would impair the effectiveness of his counsel, he was justified in requesting that a procedure be adhered to which would in his judgment preserve his right.

At the beginning of this topic we listed what we contended were four legal principles, each of which is included in the Sixth Amendment as correlative to or one of the incidents of the right to assistance of counsel.

It is respectfully submitted that the foregoing authorities firmly established each of those principles. All of the decisions emphasize the unqualified protection afforded the freedom of choice by an accused in exercise of his rights under the Sixth Amendment. Implicit is the concept that an accused fully advised, and not incompetent, is capable of making an intelligent choice in his own best interest, provided he is afforded sufficient opportunity.

Thus, in the cases of Johnson v. Zerbst and Reece v. Georgia, supra, the court concluded that an accused not advised and therefore devoid of knowledge of his rights had no opportunity for a free exercise thereof. In the cases of Wolleck v. Hudspeth, and United States v. Gergamo, supra, the courts set aside the convictions because the action of the trial court had restricted the defendants' freedom of choice in selecting counsel.

That right to conduct one's own cause in person was absolutely guaranteed by the Sixth Amendment was unquestioned after Adams v. United States, Shelton v. United States and Cantor v. United States, supra. The Constitution guarantees the accused unfettered opportunity to make a free choice -- but does not guarantee that the choice will be a wise one or that it will be exercised. In this matter the accused has the fundamental right to be wrong.

See also Collins v. Heinz, 125 F. Supp. 186; Kuczynski v. U. S. 149 F. 2d 478 C. A. 7th (1945); U. S. vs. Gutterman, 147 F. 2d. 540, C.A. 2d. (1945); Collins v. Heinz, 217 F. 2d. 62 (9th Cir. 1954) affirming the decision of the District Court cited above.

B. THE TRIAL COURT PREVENTED APPELLANT FROM CONDUCTING HIS OWN CASE IN PROPRIA PERSONA AND INSTEAD AND OVER OBJECTION FORCED APPELLANT TO PROCEED TO TRIAL WITH A LAWYER ADMITTEDLY UNABLE TO GIVE APPELLANT ANY REPRESENTATION AT THE OUTSET.

On the day of trial Appellant was his own counsel, having at all prior proceedings appeared in propria persona, and at no time altered this status. On August 3rd, prior to selection of the jury, Appellant reiterated that he was representing himself, and sought permission to associate as co-counsel another attorney to assist him in a limited capacity. The court denied this request, and at the same time advised Appellant:

> "You had better get yourself a lawyer of record, or if you are going to defend yourself bear in mind the rule . . . that those who give testimony cannot argue the case to the jury." (Tr. - 28)

Thus at the outset this Appellant had to decide which constitutional right he would forfeit. The right to sum up the favorable evidence in a case such as this was of utmost importance. Appellant knew then, and the record bears him out, that the principal question involved in the trial would be an appraisal of the credibility of the prosecution witnesses. This was a question solely for the jury. Considering the anticipated length of this trial, to deprive Appellant of the right to sum up at the conclusion of the case leaving him at that critical period without any counsel was

effectively destroying the right.

On the other hand, in order to be able properly to defend and exercise all the functions incidental to effective representation Appellant was required to give up the right to be heard in his defense, and thus leave unchallenged whatever charges, however flagrant, witnesses might make against him.

Yet, Appellee with apparent candor said this Appellant was given a choice. (Br. of Appellee, p. 46)

The only other alternative left open to Appellant was to substitute an attorney who knew nothing about the case and therefore would be unable to give Appellant any representation, at least at the outset of the trial. Either alternative effectively placed Appellant in the position of being without counsel at some phase of the proceedings. Appellant had no choice but was compelled to do just what he did, and that was to effect some kind of reasonable compromise.

Assuming arguendo that all proceedings with respect to appearing as his own counsel terminated at this point, and further assuming that Appellant substituted Mr. Fitzgerald without further objection, and further assuming that Mr. Fitzgerald, fully prepared on the law and the facts, had effectively represented Appellant, we believe that under the principle before discussed, even this state of facts would compel reversal. For not only was the right to a free choice denied this Appellant, but he was not afforded a real opportunity for any choice. (See "A" under this Topic, supra)

Appellant does not take the position here that this particular ruling is to be isolated and treated separately. The entire proceedings from 10:00 A.M. August 3rd to 10:00 A. M. August 4th constitute a single concentrated attempt on the part of this appellant to maintain the status that he held when he came into court on August 3rd, and that is as his own counsel.

This Appellant's right to continue in propria persona was seriously impaired by the initial ruling. At the end of these proceedings just prior to the commencement of the trial in the presence of the jury the right was completely destroyed. During the intervening period this Appellant at every reasonable opportunity reasserted his intention and hope that he would be permitted to conduct his own case.

Appellant attempted to find some reasonable basis with which to compromise. He began by requesting permission to argue motions of law. When Appellant obtained that concession Appellant then sought leave to be permitted to examine witnesses. It was at this point the trial judge said the matter would have to be settled on principles of law, and that since no question would arise that day he would announce his ruling the following morning. (Tr. - 34) The matter having been held in abeyance, Mr. Fitzgerald suggested Appellant move that he be made attorney of record. Appellant, endeavoring to keep his status, was careful to move Fitzgerald's association as co-counsel. (36-A-2) That afternoon Appellant again explained in detail the reasons for the necessity of being permitted to conduct his own case.

"MR. DUKE: -- I was going to appear as my

"own counsel in the case. That is still my full intention.

"Merely because I see some awkward situations arising and saw some awkward situations arising, and in order to make it a more orderly hearing, I accepted Mr. Fitzgerald's offer to come in and assist over those awkward situations. (Tr. p. 36-A-164: & 170)

"I prepared the case myself, and Mr. Fitzgerald has not prepared it, and I had prepared the case to defend myself.

"Because of the matters that your Honor brought up this morning, I agreed I wouldn't even argue to the jury at the end of the case, argue the evidence to the jury."

"MR. DUKE: At the beginning, there has not been sufficient time, and I came down here today fully intending to maintain the same official status I had at all times maintained in this case, and that is as my own counsel..."

"I feel that I must, at the outset, participate in this case, and I will assure your Honor I will make my participation, as to my own interest, as little as possible and still consistent with defending myself."

The following morning the court announced its final ruling in effect directing that Mr. Fitzgerald proceed to trial in charge of Appellant's case with Appellant being permitted to participate to a very

limited extent.

Appellant, under the ruling not being able to open his case before the jury, elected to forfeit his right to finally argue in order to have effective representation at the outset of the trial. Appellant announced his election, asking the court if he would not be permitted to take charge of his case if Mr. Fitzgerald withdrew. The court refused to permit Mr. Fitzgerald to withdraw on the grounds that Appellant had moved the day before that he be made his attorney, although Appellant explained that he was prepared and Mr. Fitzgerald was not, that he had moved that Mr. Fitzgerald be associated as co-counsel, and again explained his reasons. Appellant then made a formal motion that the court release Mr. Fitzgerald, which motion the court denied and the trial commenced.

> "MR. DUKE: I only want to make an opening statement because I alone am prepared --"
>
> "THE COURT: That is your misfortune, Mr. Duke."
>
> "MR. DUKE: If Mr. Fitzgerald withdrew from the case I would be permitted to proceed in propper?"
>
> "THE COURT: I am not going to permit him to withdraw at this time. You started out with him and you are going to have to live with the fact you have an attorney here, Mr. Duke."

"MR. DUKE: I didn't start out with him."

"THE COURT: Well, so far as these proceedings that commenced yesterday are concerned, you did. Didn't you move that he be made your attorney here?"

"MR. DUKE: I moved he be associated as co-counsel."

" I have appeared at all times for myself and have made it plain to the United States Attorney and to the court at all times that I intended to represent myself in this matter.

"MR. DUKE: I don't know whether I formally moved or not. I do at this time formally move the court to allow Mr. Fitzgerald to be released."

"THE COURT: Denied."
(All emphasis added)

Thus appellant, charged with ten felonies, including three separate conspiracies, was forced to commence a seven week trial represented by an attorney who admittedly knew nothing about the case.

In Adams v. U. S., (1952) 317 U. S. 269, 279, the Supreme Court stated at page 279:

"An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and

> "truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court. But the Constitution does not force a lawyer upon a defendant."

Appellant did have the absolute right under the Constitution to elect to defend himself without the assistance of any counsel. We submit that on the record of the proceedings prior to the commencement of the trial in the presence of the jury that this Appellant earnestly and sincerely attempted to exercise that right. The final order of the trial court denied to this appellant his right to conduct his own cause in the manner that he deemed to his best advantage. It would be impossible to know whether this appellant would have managed his cause any more effectively for the obvious reason he was not permitted to do so. In Tanksley v. U. S., 145 F. 2d 58 (C. A. 9th, 1944) this court held: (re right to public trial)

> "A violation of the constitutional right necessarily implied prejudice and more than that need not appear. Furthermore, it would be difficult if not impossible in such cases for a defendant to point to any definite personal injury. To require him to do so would impair or destroy the safeguard."

In U. S. v. Kobli, 172 F. 2d 919, (C. A. 3rd 1949) the court stated at page 924:

> "We are duty bound to preserve the right (public trial) as it has been handed down to us and this we will do only if we make sure

> "that it is enforced in every criminal case, even in such a sordid case as the one now before us. (emphasis added.)

Although as we have pointed out in our discussion of the authorities at page 10-23 supra, in this area the trial court has no discretion and if this Appellant had the right under the Constitution to choose to defend either in person or by counsel, then the court lost jurisdiction and there is no need to point to any prejudice. However, could there be any greater prejudice to an accused charged with ten felonies than to be compelled to shop for counsel among the lawyers for his co-defendants a bare five minutes prior to the time the jury commences hearing evidence against him?

If the Government cannot convict Appellant in a trial in which he is effectively represented, then he should not be convicted.

We have attempted in the beginning of this topic to point out the legal principles which we think are applicable here. We believe that the authorities discussed establish without question those principles. It is submitted that the facts uncontradicted in the proceedings of August 3rd and August 4th compel the reversal of this judgment when the legal principles and facts are considered together.

Respectfully submitted,

BARTON C. SHEELA, JR.
GOERGE W. RUTHERFORD
CLINTON F. JONES
WESLEY B. BUTTERMORE
Attorneys for Appellant

APPENDIX

APPENDIX
TO REPLY BRIEF

PROCEEDINGS OF AUGUST 3, 1955
PRIOR TO SELECTION OF JURY

EXCERPTS FROM RECORD

(Tr. p. 27)

"MR. BOWLER: May I make this observation. I notice Mr. Duke is here, represented by counsel. He has made several observations in this chambers meeting here. ."

(Tr. p. 28)

"THE COURT: . . . if Mr. Duke is represented by counsel here, then Mr. Duke should speak to the court through counsel,

"except when he gives evidence . . ."

"MR. DUKE: I am representing myself, your Honor, associating Mr. Fitzgerald."

"THE COURT: You can't do that. Is Mr. Fitzgerald of record?"

"MR. DUKE: No, your Honor."

"THE COURT: You had better get yourself a lawyer of record, or if you are going to defend yourself, bear in mind the rule. Now, I don't know how firm a rule it is, but it is a rule that those who give testimony cannot argue the case to the jury. And if you intend to testify, bear in mind that there are rules which would prevent your arguing the case to the jury, if you do that. If you want Mr. Fitzgerald to be your attorney, get him of record. If he is of record you cannot act in pro per or as an attorney with him."

"MR. FITZGERALD: Cannot be associated with him, in other words?"

(Tr. p. 29)

"THE COURT: No."

"MR. DUKE: I brought Mr. Fitzgerald here out of an abundance of kindness on his part, your Honor, to do those things which I knew the rules would preclude myself from doing.

"That being the case, Mr. Fitzgerald has

"agreed to come down and assist in those matters which would, I think, make it less awkward in the courtroom. But I have appeared for myself at all times here, and I would, like one of the other defendants, have two counsel. And if I may be permitted to act in that dual capacity and participate -- "

"THE COURT: What law allows it?"

"MR. FITZGERALD: Well, I guess the law entitles counsel to associate anybody he wants . . .

"He knows this case . . . And I am coming here to assist when he cannot with propriety do the job himself . . ."

***

(Tr. P. 31)

"THE COURT: . . . for Mr. Duke to undertake to examine witnesses or to argue motions or evidence, I think, is very unwise from the standpoint of Mr. Duke himself, from the standpoint of your having adequate control of his case, and from the standpoint of an orderly procedure here."

(Tr. p. 34) ***

" . . . Gentlemen, it appears to me that so far as I can decide that matter, it must be decided on principles of law rather than upon principles of whether it is wise for Mr. Duke or pleasant for the litigants and other lawyers and witnesses.

". . . I don't know at the moment whether I can restrict Mr. Duke and Mr. Fitzgerald, from having Mr. Duke participate in the examination of witnesses. If I can I will, because I don't think he should do it..."

"Can the prosecution give me the benefit of some research on that?"

"MR. BOWLER: I assume there will be no question arise in today's proceedings, if we are interrogating the jury."

"MR. FITZGERALD: No."

"THE COURT: We will not take any evidence today."

"MR. BOWLER: We will present whatever authority we can."

"MR. DUKE: I might say, your Honor, I would expect, if I am permitted to do that, that your Honor would give me the same treatment that you would give any counsel, and if I overstep the bounds, forget I am a defendant for the moment and stop me and overrule me and censure me sharply in court, because, I assure you, I believe I can contain my emotions and assume a dual role in that respect and will seriously endeavor to do so. And certainly will not take any exception whatever to any objections or any serious rebuke from the court if I overstep my bounds."

"THE COURT: This conference in chambers is now ended, and we will take up in court at 10:30."

(Tr. p. 36-A-1)

(Whereupon the following proceedings were had in the presence but out of the hearing of the venire:)

Tr. p. 36-A-2)

"MR. FITZGERALD: Now the record does not show my association as counsel of record.

"Would you make that motion now, so that I am officially associated?"

"MR. DUKE: I move that Mr. Clifford K. Fitzgerald, with offices at 406 United States National Bank Building, San Diego 1, California, an attorney licensed to practice law in the State of Califoria and admitted to practice in this court, be associated as my co-counsel in this case."

"THE COURT: I don't know whether you can associate him and remain both defendant and an attorney. I think you have to do one or the other, either defend yourself and not argue the case, if you take the stand and testify, or substitute an attorney.

"But, for reasons which were gone into in chambers, I will allow Mr. Fitzgerald to be associated with the understanding that he is to conduct the case, except argument of

"motions upon matters of law . . .

"I will keep under submission whether you may examine witnesses until tomorrow . . ."

CONFERENCE AFTER ADJOURNMENT
ON AUGUST 3rd, 1955
EXCERPTS FROM RECORD
***

(Tr. p. 36-A-160)

"MR. FITZGERALD: The court please, I asked for the conference. It is in regard to this order to interview a witness.

"Counsel for the Government has prepared the order, which provides that the witnesses be interviewed by Richard Vaughn, Edgar G. Langford, attorneys for Vic Buono, and Thomas Whelan, attorney for Ballard, and by myself as attorney for the defendant Duke.

"The order is not agreeable to the defendant Duke because of the fact I have recently come into this case and do not know what can be developed from these witnesses.

"He feels that he is thoroughly familiar with it and desires toattend the interview and participate in the interview."

"THE COURT: What is the objection to his doing so?"

"MR. STEWARD: Well, Judge, we might as

"THE COURT: This conference in chambers is now ended, and we will take up in court at 10:30."

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"He feels that he is thoroughly familiar with it and desires toattend the interview and participate in the interview."

"THE COURT: What is the objection to his doing so?"

"MR. STEWARD: Well, Judge, we might as

"well face this issue right now, as to what his participation will be during the course of trial . . ."

"THE COURT: . . . you had indicated this morning a willingness to let the defense examine these witnesses . . ."

". . . What is the objection to Mr. Duke participating in the interview?. . ."

"MR. STEWARD: Your Honor, for the exact same reason the court earlier today indicated, the possibilities of the argumentative type of questions that you yourself brought out . . ."

***

(Tr. p. 36-A-164)

"MR. FITZGERALD: . . . My predicament is this: Mr. Duke can't even attend the conference, the way this order is drawn. And I am going to examine Todd and this Spicuzza, and there may be some matters I should ask him about, and I wouldn't even know anything about it. . ."

"MR. DUKE: I am not going to start any commotion. Last week here I was -- and everybody was under full agreement -- I was going to appear as my own counsel in the case. That is still my full intention.

"Merely because I see some awkward situations arising and saw some awkward situations arising, and in order to make it a more orderly hearing, I accepted Mr. Fitzgerald's

"offer to come in and assist over those awkward situations.

"I prepared the case myself, and Mr. Fitzgerald has not prepared it, and I had prepared the case to defend myself.

"Because of the matters that your Honor brought up this morning, I agreed I wouldn't even argue to the jury at the end of the case, argue the evidence to the jury. I would leave that to Mr. Fitzgerald, because, sitting through the trial, by that time I know he would certainly have a better grasp of it, even, than I would.

"At the beginning, there has not been sufficient time, and I came down here today fully intending to maintain the same official status I had at all times maintained in this case, and that is as my own counsel . . ."

(Tr. p. 36-A-166)

"But I haven't prepared this case and didn't come here today prepared for Mr. Fitzgerald to go into this thing fully. I think in a few days time he will certainly be able to do it.

"I realize the hazards in it. I realize the old admonition that the lawyer that represents himself has a fool for a client. . ."

***

(Tr. p. 36-A-168)

"MR. FITZGERALD: Can my associate

"come with me to this conference and ask the questions he wants to ask, or at least, be present and suggest them to me?"

(Tr. p. 36-A-170)

"THE COURT: . . . Upon the present showing the motion is denied."

"MR. DUKE: Your Honor, while we are here, may we clarify my status?

"In arguing this particular point, I think I stated my position and there is no need for me to argue it again.

"I feel that I must, at the outset, participate in this case, and I will assure your Honor I will make my participation, as to my own interest, as little as possible and still consistent with defending myself.

"THE COURT: I think you are either your attorney or Mr. Fitzgerald is your attorney, and that you can't ride both horses, that is, be a man in pro. per. and a man with an attorney, too.

"However, in view of the difficulty which your attorneys say you have, due to the fact, apparently that you let this go until the last minute before getting ready for the trial, to the extent of having an attorney well briefed on it, I will let you ask questions of witnesses."

(Tr. p. 36-A-171)

". . . I can see where you are in a bit of a

"difficult position, which it appears, is due to neglect of this case. . ."

"MR. DUKE: Your Honor, I intend to and have at all times intended to appear as my own counsel."

"THE COURT: I have given you permission within limits to do so."

PROCEEDINGS ON MORNING OF
AUGUST 4, 1955, 10:00 A.M.
PRIOR TO COMMENCEMENT OF TRIAL
IN PRESENCE OF JURY

(Tr. p. 39)

"THE COURT: Now, that there be no confusion about the participation of Mr. Duke, I think I indicated in yesterday's session that Mr. Duke is either under an obligation to appear in pro per or to be represented by counsel, but that a hybrid of the two is something to which he does not have a right, as a matter of right."

"The cases to which I have had access since that matter was presented to me yesterday bear that out. It is the court's understanding that Mr. Fitzgerald will make all arguments of fact and the opening statement to the jury on behalf of Mr. Duke, and Mr. Duke's participation in the trial, except as he will participate as a defendant and as a witness, if he so chooses, will be that he will be here as a defendant. He may be a witness, if he so

"elects, and the court will permit him to participate in the cross-examination of witnesses or in the direct examination of witnesses to the extent that we will continue to recognize the rule that there shall be but one counsel for a side or a party as to any one witness."
(Tr. p. 42)

". . . if we get into argumentative examination of witnesses, the sort of thing that a defendant's natural interest in the case will tempt him to do, then I will not permit further examination of witnesses by Mr. Duke. As long as the examination conducted by Mr. Duke remains entirely an examination, free from argument, then Mr. Duke may participate in the examination to the extent the court has indicated."

"MR. DUKE: If it please the court, for the record, may I note an exception to the court's ruling to the extent I cannot make an opening statement on my own behalf. I indicated --"
(Tr. p. 42)

"THE COURT: . . . I understand you want to make an opening statement, you want to argue the case."

"MR. DUKE: No, I do not want to argue the case, your Honor.

"THE COURT: You can't make an opening statement, either.

"MR. DUKE: I only want to make an opening statement because I alone am prepared -- "

"THE COURT: That is your misfortune, Mr. Duke. You have been under indictment here for months, and to come to court with only yourself prepared, knowing the law or being trained to know it, is just something you are going to have to live with. Now, you get Mr. Fitzgerald educated as to the facts.

"I know academically you are educated, Mr Fitzgerald, but as to the facts, if you are not well prepared, you proceed last and I will see there is ample recess so that Mr. Duke can write it out, if he wants."

'MR. DUKE: If Mr. Fitzgerald withdrew from the case I would be permitted to proceed in propper?"

"THE COURT: I am not going to permit him to withdraw at this time. You started out with him and you are going to have to live with the fact you have an attorney here, Mr. Duke."

"MR. DUKE: I didn't start out with him."

"THE COURT: Well, so far as these proceedings that commenced yesterday are concerned, you did. Didn't you move that he be made vour attorney here?"

"MR. DUKE: I moved he be associated as co-counsel. And I explained the reason for that was there were certain awkward situations that would arise when a person represents

"himself, and Mr. Fitzgerald had volunteered to come down and give me assistance, particularly in arguing to the jury and in examining myself when I took the witness stand. That is what I pointed out.

"I have appeared at all times for myself and have made it plain to the United States Attorney and to the court at all times that I intended to represent myself in this matter.

(Tr. p. 44)

"THE COURT: . . . when defendants represent themselves it is very difficult to maintain the type of conduct of a case which is best designed to produce a just result and an orderly presentation . .. because of the personal and emotional involvement of a defendant it is difficult.

"The Constitution says that you are entitled to representation by counsel of your choice. Inferentially, you may appear by the same authority and represent yourself. But you do one or the other. In fact, I think the Constitution says that the defendant may appear in person or by counsel. . .

"Now you have an attorney here, you are going to appear by the attorney. I will not release him unless something is brought to my attention beyond what is presently before me.

"I will relax in discretion, I will relax the rule about participation to the extent that you may cross-examine if it is done within the

"limits which the court has indicated.

"To all this an exception by Mr. Duke is noted."

"MR. DUKE: I don't know whether I formally moved or not. I do at this time formally move the court to allow Mr. Fitzgerald to be released."

"THE COURT: Denied."

(All emphasis added)